Supreme Court, U. S.
FILED
JUN 17 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5677

MAURICE SCHICK,

Petitioner,

v.

GEORGE J. REED, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

HOMER E. MOYER, JR.
ROBERT N. SAYLER
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. RETROSPECTIVE APPLICATION OF *FURMAN V. GEORGIA* INVALIDATES THE NO-PAROLE PROVISION OF PETITIONER'S COMMUTED SENTENCE SINCE THAT PROVISION COULD NEVER HAVE BEEN IMPOSED BUT FOR THE PRIOR IMPOSITION OF THE DEATH PENALTY 9

A. Retroactive application of *Furman* requires that the death sentence be expunged and that the only alternative sentence provided by law be substituted 10

B. Analagous case law and important policy considerations likewise support invalidation of the no-parole restriction 18

II. COMMUTATION TO LIFE IMPRISONMENT WITH NO POSSIBILITY OF PAROLE EXCEEDS THE PRESIDENT'S ARTICLE II, SECTION 2 POWER TO COMMUTE A SENTENCE 23

A. In exercising his constitutional power to commute a sentence, the President can commute only to a punishment provided by statute 24

Page

B. The action of the President in this case can not now be sustained because it has the net effect of increasing petitioner's sentence above the maximum lawful punishment 33

CONCLUSION 34

TABLE OF AUTHORITIES

Cases:

Anderson v. State, 267 So.2d 8 (Fla. 1972) 12

Bates v. Wilkinson, 267 F.2d 779 (5th Cir. 1959) 11

Bell v. United States, 349 U.S. 81 (1955) 27

Biddle v. Perovich, 274 U.S. 480 (1927) 23, 24, 25, 26, 28, 30, 32, 34

Bishop v. United States, 223 F.2d 582 (D.C. Cir. 1955) 30

Burgett v. Texas, 389 U.S. 109 (1967) 19

Capler v. State, 268 So.2d 338 (Miss. 1972) 12

Chapman v. Scott, 10 F.2d 156 (D. Conn.), *aff'd*, 10 F.2d 690 (2d Cir. 1926), *cert. denied*, 270 U.S. 657 (1926) 23, 28

Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1973) 12

DeStefano v. Woods, 392 U.S. 631 (1968) 18

Ex parte Grossman, 267 U.S. 87 (1925) 31

Ex parte Lefors, 165 Tex. Crim. 51, 303 S.W.2d 394 (Tex. Cr. App. 1957) 23

Ex parte United States, 242 U.S. 27 (1916) 27

Ex parte Weathers, 33 F.2d 294 (S.D. Fla. 1929) 30

Ex parte Wells, 59 U.S. (18 How.) 307 (1855) 25, 27, 30, 31

Furman v. Georgia, 408 U.S. 238 (1972) 2, 7-11, 13-18, 20-22, 29, 34

Garcia v. State, 501 P.2d 1128 (Okla. Crim. 1972) 12

Page

Gideon v. Wainwright, 372 U.S. 335 (1963) 18, 19

Gilderbloom v. State, 160 Tex. Crim. 471, 272 S.W.2d 106 (1954) 23

Graham v. State, 253 Ark. 462, 486 S.W.2d 678 (1972) 12

Herman v. Powell, 139 Mont. 533, 367 P.2d 553 (1961) 23

Huggins v. Commonwealth, 213 Va. 327, 191 S.E. 2d 734 (1972) 12

Hurt v. Moseley, No. 71-1307 (10th Cir., Sept. 13, 1971) 30

In re Charles, 115 Kan. 323, 222 P. 606 (1924) 23

In re Walker, 112 Cal. Rptr. 177 (1974) 13, 16

Johnson v. New Jersey, 384 U.S. 719 (1966) 18

Jones v. Looney, 107 F. Supp. 624 (E.D. Mich. 1952) 11

Kavalin v. White, 44 F.2d 49 (10th Cir. 1930) 25, 30

Kitchens v. Smith, 401 U.S. 847 (1971) 19

Linkletter v. Walker, 381 U.S. 618 (1965) 18

Loper v. Beto, 405 U.S. 473 (1972) 19

Lupo v. Zerbst, 92 F.2d 362 (5th Cir. 1937), *cert. denied*, 303 U.S. 646 (1938) 25, 30

Marks v. Louisiana, 408 U.S. 933 (1972) 12

McKnight v. Hunter, 98 F. Supp. 605 (D. Kan. 1951) 11

O'Callahan v. Attorney General, 230 F. Supp. 766, *aff'd*, 338 F.2d 989 (1st Cir. 1965), *cert. denied*, 381 U.S. 926 (1964) 11

People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880 (1972) 12-14

Page

People v. Speck, 52 Ill.2d 284, 287 N.E.2d 699 (1972) 12

Pickelsimer v. Wainwright, 375 U.S. 2 (1963) 19

Robinson v. Neil, 409 U.S. 505 (1973) 11

Schwab v. Berggren, 143 U.S. 442 (1892) 23

Semmes v. United States, 91 U.S. 21 (1875) 30, 31

State v. Baker, 81 Wash.2d 281, 501 P.2d 284 (1972) 15, 16

State v. Johnson, 31 Ohio St.2d 106, 285 N.E.2d 751 (1972) 12

State v. Square, 263 La. 291, 268 So.2d 229 (1972) 12

State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973) 12

Stewart v. Massachusetts, 408 U.S. 845 (1972) 11

Stone v. Burch, 114 Fla. 460, 154 So. 128 (1934) 23

Stovall v. Denno, 388 U.S. 293 (1967) 18

Stroud v. Johnston, 139 F.2d 171 (9th Cir. 1943), *cert. denied*, 321 U.S. 796 (1944) 30

Sullivan v. State, 229 Ga. 751, 194 S.E.2d 410 (1972) 12

Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966) 18

United States v. Calandra, ___ U.S. ___, 94 S.Ct. 613 (1974) 21

United States v. Commissioner of Immigration, 5 F.2d 162 (2d Cir. 1924) 23

United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) 31

United States v. Six Lots of Ground, 27 Fed. Cas. 1097 (1872) 24

Page

United States v. Tucker, 404 U.S. 443 (1972) 19

United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833) 30

Vitale v. Hunter, 206 F.2d 826 (10th Cir. 1953) 30

Walker v. Georgia, 408 U.S. 936 (1972) 12

CONSTITUTION AND STATUTES

Constitution of the United States:

Article II, Section 2 ..... 3, 8, 23, 25

Eighth Amendment 3, 29

10 U.S.C. §§857, 858 ..... 11, 16

10 U.S.C. §§866, 867, 869 16

10 U.S.C. §871 ..... 3, 4, 6, 16

10 U.S.C. §§877, 934 11

10 U.S.C. §918 ..... 3, 5, 10, 20, 34

10 U.S.C. §§952, 953 11

18 U.S.C. §§4202, 4203 ..... 6, 10, 11, 22

18 U.S.C. §4204 3

28 U.S.C. §1254(1) 2

Miscellaneous

Addict Rehabilitation Act of 1966 33

59 Am. Jur.2d §§3, 7, 8 23

3 Attorney General's Survey of Release Procedures (1939) 23, 28

Black's Law Dictionary (4th ed. 1968) 23

4 W. Blackstone, Commentaries on the Laws of England (Cooley ed. 1899) 25

Note, Executive Clemency in Capital Cases, 39 N.Y.U. L. Rev. 136 (1964) 23

Exec. Order No. 11476, 34 Fed. Reg. 10502 (1969) 11

Headquarters, Department of the Army, Army Regulation 190-26 (1972) 11

H.R. Rep. No. 1341, 61st Cong., 2d Sess. 4 (1910) 21

H.R. Rep. No. 2388, 84th Cong., 2d Sess. (1956) 32

	Page
Humbert, The Pardoning Power of the President (1956)	23, 25
Manual for Courts-Martial, 1969 (Revised edition)	11, 15
Moyer, Justice and the Military (1972)	16
Narcotics Control Act of 1956	32
Rules of the United States Board of Parole (1965)	6
36 Stat. 819	21
37 Stat. 650	21
70 Stat. 567	21
80 Stat. 1449	21
Statute of Northampton, 1328, 2 Edw. III, c.2	25
2 U.S. Code Cong. & Ad. News (1956)	32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5677

MAURICE SCHICK,

Petitioner

v.

GEORGE J. REED, *et al.*,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

There have been five relevant opinions from various military and civil tribunals, all of which are set forth in the Appendix.

The opinion of the Army board of review was not reported. (A. 4.) The opinion of the Court of Military Appeals remanding the case to the board of review for reconsideration of the accused's sanity is reported at 6 U.S.C.M.A. 493. (A. 9.) The opinion of the board of review on reconsideration is reported at 21 C.M.R. 343.

(A. 12.) The subsequent opinion of the Court of Military Appeals is reported at 7 U.S.C.M.A. 419. (A. 20.)

The United States District Court for the District of Columbia rendered no opinion. The opinion of the United States Court of Appeals for the District of Columbia, which affirmed the District Court's order granting the defendant's Motion for Summary Judgment, is reported at 483 F.2d 1266 (D.C. Cir. 1973). (A. 59.)

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1). Pursuant to that provision, this Court on April 22, 1974, granted appellant's Petition for a Writ of Certiorari.

QUESTIONS PRESENTED

1. Whether the no-parole provision contained in the commutation of Petitioner's death sentence is lawful where the underlying death sentence itself is retroactively illegal under *Furman v. Georgia*, 408 U.S. 238 (1972), and the only other punishment that could have been imposed at trial was life imprisonment with possibility for parole.

2. Whether the President, acting under his constitutional power to "grant reprieves and pardons," may lawfully commute a sentence to punishment that is not authorized by law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Article II Section 2 clause from which the President draws authority to commute sentences and the cruel and unusual punishment clause of the Eighth Amendment. These provisions read, respectively, as follows:

> The President . . . shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. U.S. Const. Art. II, § 2.
>
> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. Amend. VIII.

Article 118 of the Uniform Code of Military Justice provides that:

> Any person subject to [the UCMJ] who, without justification or excuse, unlawfully kills a human being, when he –
>
> (1) has a premeditated design to kill; . . .
>
> is guilty of murder, and . . . shall suffer death or imprisonment for life as a court-martial may direct. 10 U.S.C. § 918.

18 U.S.C. § 4202, *Prisoners Eligible*, provides:

> A Federal prisoner . . . wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years.

Article 71 of the Uniform Code of Military Justice, *Execution of sentence; suspension of sentence*, provides, in part:

(a) No court-martial sentence extending to death or involving a general or flag officer may be executed until approved by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence. 10 U.S.C. §871(a).

STATEMENT OF THE CASE

The basic facts in this case are straightforward and undisputed. As a result of a military criminal conviction, appellant has been incarcerated for twenty years and, barring action by this Court, cannot be released prior to his death. The reason is that Petitioner is now subject to the following prohibition that the President imposed in commuting Petitioner's death sentence in 1960:

"Maurice L. Schick . . . [shall be] confin[ed] at hard labor for the term of his natural life. This commutation of the sentence is expressly made on the condition that the said Maurice L. Schick shall never have any rights, privileges, claims or benefits arising under the parole and suspension or remission of sentence laws of the United States and the regulations promulgated thereunder governing federal prisoners confined in any civilian or military penal institution or any acts amendatory or supplementary thereto." (A. 35.)

The underlying facts are as follows. Petitioner Maurice Schick, a Master Sergeant in the United States Army, was tried by general court-martial in 1954 for the murder of a young girl. The only contested issue at trial was the sanity of the accused. Two eminent civilian Japanese psychiatrists examined the accused and found that he was psychotic, either epileptic or schizophrenic, and that he was unable to distinguish

right from wrong. Four Army psychiatrists, however, testified for the prosecution that the accused was suffering from a non-psychotic behavior disorder and that he could adhere to the right and possessed the mental capacity to stand trial. Relying on this latter testimony, the Army court-martial rejected the accused's defense of insanity, convicted him of premeditated murder under Article 118 of the Uniform Code of Military Justice (10 U.S.C. §918), and sentenced him to death.

On review, an Army board of review affirmed the conviction and sentence in an unpublished opinion. (A. 4.) In support of its conclusion, the board cited a Surgeon General's opinion, based on a review of the record, that the accused possessed both mental responsibility at the time of the offense and mental capacity at the time of trial. (A. 7-8.) The case was then forwarded for further review to the civilian Court of Military Appeals which granted a continuance prior to argument to allow further civilian psychiatric examination. The accused was examined by psychiatrists and psychologists at the Menninger Clinic, including Dr. Menninger, who reported to the court that in their opinion the accused was "unable to adhere to the right with regard to the offenses charged at the time he committed the crime." Presented with this new report, the Court of Military Appeals remanded the case to the board of review for reconsideration of the sanity issue. (A. 9.)

Also presented to the board of review as other new evidence were a report by Dr. Winfred Overholser, Superintendent, St. Elizabeth's Hospital, Washington, D.C., and a second opinion by the Surgeon General. Dr. Overholser's opinion was that the accused was unable at the time of the offense to adhere to the right or to formulate the requisite premeditation and " 'that Schick is entitled to a verdict of acquittal by reason of

insanity.'" The Surgeon General stated in his second report that despite the Menninger report he adhered to his original opinion.

Upon reconsideration, the Army board of review again affirmed the findings and sentence. (A. 12.) The Court of Military Appeals, empowered to consider only questions of law, affirmed by a 2-1 decision. (A. 20.) As required by statute, the case was then forwarded to the President for final review. 10 U.S.C. §871(a).

In 1960, six years after Schick had been sentenced to death, President Eisenhower, exercising his authority under Article II. Section 2 of the Constitution, commuted Schick's death sentence to "confinement at hard labor for the term of his natural life," with the express condition that Schick never be eligible for consideration for parole. (A. 35.) Then, as required by statute (10 U.S.C. §871(a)), the President ordered the sentence executed, as modified, and directed that Petitioner be committed to the custody of the Attorney General. Petitioner was accordingly dishonorably discharged from the Army and transferred to the federal penitentiary at Lewsiburg, Pennsylvania.

Petitioner has now been incarcerated for 20 years. Under applicable statutes (18 U.S.C. §§4202-03) and Regulations (Rules of the United States Board of Parole effective July 1, 1965, at 8-11), Petitioner would have become eligible to be considered for parole in March 1969, but for the no-parole provision in President Eisenhower's "commutation" action of March 25, 1960.

In 1971, Petitioner sought a declaratory judgment in United States District Court to require the chairman and members of the United States Parole Board to consider him for parole. (Complaint, A. 36.) At a hearing on November 5, 1971, the United States District Court for the District of Columbia (per Hart, J.) dismissed the case for lack of subject matter jurisdiction. (A. 41.) The Court of Appeals summarily

reversed and remanded the case to the District Court for further action. (A. 56.) On March 24, 1972, the District Court granted the Board of Parole's Motion for Summary Judgment "on both constitutional and military justice grounds. . . ." (A. 57.) The Court of Appeals, by split decision, affirmed the District Court. 483 F.2d 1266 (D.C. Cir. 1973). (A. 59.) A majority of the court held that the retroactivity of *Furman v. Georgia*, 408 U.S. 238 (1972), is irrelevant to Schick on the grounds that when *Furman* was decided Petitioner was "not under a death sentence." 483 F.2d at 1270. The Court also concluded that the President's action was not otherwise unlawful and that the condition imposed did not constitute cruel and unusual punishment. In dissent, Judge Wright expressed the view that the retrospective application of *Furman* requires that the death sentence imposed by court-martial be vacated and replaced by the only other sentence which could lawfully have been imposed, life imprisonment with the possibility of parole. A Petition for Rehearing and Suggestion for Rehearing En Banc filed on August 21, 1973, was denied October 1, 1973.

By order of April 22, 1974, this Court granted Schick's Petition for Writ of Certiorari. Before this Court, as before the courts below, Petitioner does not seek release from confinement. Judgment in his favor would entitle him only to the right to be considered for parole.

SUMMARY OF ARGUMENT

I.

Petitioner, whose death sentence has been commuted to no-parole life, continues to serve a unique and severe

penalty, the existence of which is now possible only because of the prior imposition of the death penalty.

Six years after trial Petitioner's death sentence was commuted by the President to life imprisonment with no possibility of parole. The only two authorized punishments for the offense of which he was convicted were death and life imprisonment *with* possibility of parole, Petitioner could not now be subject to the no-parole provision had the death penalty not first been imposed on him at trial. *Furman v. Georgia,* which invalidated the "imposition" as well as the carrying out of death penalties, has been applied retroactively by this Court. So applied, *Furman* invalidates the indispensable vehicle through which Petitioner became subject to his present no-parole life sentence. For this reason the no-parole restriction can not stand. This result is compelled by the plain wording of *Furman,* other decisions on point, case law on retroactivity, and the interests here involved. To hold otherwise would permit Petitioner, who was singled out for clemency, to continue to serve a unique sentence, more severe than the sentences now being served by those prisoners, not subjects of clemency, who had been sentenced to death but not executed at the time of *Furman.* So irrational a result would perpetuate a severe inequity and pervert the purpose of the clemency power.

II.

The no-parole penalty imposed by the President transgresses two clear limits on the President's commutation powers under Article II, Section 2, of the Constitution. First, in exercising commutation powers, the President can not create new punishments. Controlling precedent, the constitutional doctrine of separation of powers, and strong policy considerations

require that when the President commutes a sentence he can only commute to a lesser punishment prescribed by law. The no-parole life imprisonment sentence imposed upon Petitioner does not satisfy that requirement because it is nowhere prescribed in the Uniform Code of Military Justice and, indeed, is completely foreign to civilian, as well as military, federal law.

Second, the net effect of the President's action in this case has been to increase, rather than reduce, Petitioner's sentence. In light of the retroactive invalidation of the death penalty, the only alternative lawful punishment for the offense of which he was convicted is life imprisonment *with* possibility for parole. The net effect of the President's action has, therefore, been to increase Petitioner's sentence above the lawful maximum, an act beyond the President's constitutional power.

ARGUMENT

I.

RETROSPECTIVE APPLICATION OF *FURMAN V. GEORGIA* INVALIDATES THE NO-PAROLE PROVISION OF PETITIONER'S COMMUTED SENTENCE SINCE THAT PROVISION COULD NEVER HAVE BEEN IMPOSED BUT FOR THE PRIOR IMPOSITION OF THE DEATH PENALTY.

Petitioner's death sentence was commuted to life imprisonment on condition that he never be considered for parole. At issue in this case is the validity of the no-parole provision. *Furman v. Georgia,* 408 U.S. 238 (1972), is applicable because the imposition of the death sentence was the indispensable vehicle through which Petitioner became subject to his present sentence.

Under military law a serviceman could be subjected to a sentence to life imprisonment with no possibility of parole only through the succession of events that occurred in this case – namely, the imposition of the death sentence at trial and subsequent action by the President, under his constitutional power, to commute that sentence. Absent the imposition of a sentence to death, the most severe sentence a serviceman could ever face is life imprisonment *with* possibility of parole. Because the no-parole component of Petitioner's commuted sentence is therefore uniquely dependent on the prior imposition of the death penalty, retrospective application of *Furman* is controlling and invalidates the bar against Petitioner's ever being considered for parole.

A. Retroactive Application of *Furman* Requires that the Death Sentence Be Expunged and that the Only Alternative Sentence Provided by Law Be Substituted.

There is no dispute in this case about the nature of the relationship between the death penalty and the no-parole provision of Petitioner's commuted sentence; it is incontestable that the no-parole condition could not now exist had the court-martial before which Schick was tried not imposed the death penalty. Article 118 of the Uniform Code of Military Justice (UCMJ) authorizes only two sentences for a conviction of premeditated murder: death or life imprisonment. 10 U.S.C. §918. The punishment of life imprisonment under article 118 is, without exception, life imprisonment with possibility of parole. Had Petitioner been sentenced to life imprisonment rather than death, he would now be eligible for parole under the same standards as all other federal prisoners. 18 U.S.C.

§§4202-03 (1970).[1] Indeed, confinement without opportunity for parole is unknown to military law: it is not, and never has been, authorized punishment for any offense under the UCMJ. 10 U.S.C. §§877-934; para. 127, Manual for Courts-Martial, 1969 (Revised edition), Exec. Order No. 11476, 34 Fed. Reg. 10502 (1969) (hereinafter cited as MCM, 1969 (Rev.)). Nor may a no-parole condition be imposed by military reviewing authorities acting to commute a sentence. Para. 88*c*, MCM, 1969 (Rev.). In short, the no-parole condition of the commutation was made possible only through the court-martial's imposition of the death sentence; but for the imposition of that sentence it could not now exist.

Similarly beyond dispute is the retroactivity of *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman* this Court, per curiam, invalidated the "imposition and carrying out" of discretionary death sentences. 408 U.S. at 239. Subsequent decisions of this Court have accorded *Furman* fully retroactive effect. *Robinson v. Neil*, 409 U.S. 505, 508 (1973); *Stewart v. Massa-*

[1] Military prisoners may be confined in military confinement facitities (usually the United States Disciplinary Barracks in the case of Army prisoners) or, as was Schick, transferred to a federal penitentiary. In either event, Schick would now be eligible for parole. Military prisoners incarcerated in federal penitentiaries are governed by the same statutes and regulations applicable to all federal prisoners, 18 U.S.C. §§4202-3 (1970). *See* 10 U.S.C. § 858 (1970); Jones v. Looney, 107 F. Supp. 624 (E.D. Mich. 1952); McKnight v. Hunter, 98 F. Supp. 605 (D. Kan. 1951); Bates v. Wilkinson, 267 F.2d 779 (5th Cir. 1959); O'Callahan v. Attorney General, 230 F. Supp. 766, *aff'd*, 338 F.2d 989 (1st Cir. 1964), *cert. denied*, 381 U.S. 926 (1964). Likewise, had Schick been confined in the United States Disciplinary Barracks rather than federal prison, he would now be eligible for parole under the appropriate statutes and regulations. 10 U.S.C. §§952-53 (1970); Headquarters, Department of the Army, *Army Regulation* 190-26, Ch. 1, para. 1-4(a)(2) (March 20, 1972).

chusetts, 408 U.S. 845 (1972); *Marks v. Louisiana*, 408 U.S. 933 (1972); *Walker v. Georgia*, 408 U.S. 936 (1972).

Following these decisions, lower courts have held that prisoners sentenced to death must have their sentences vacated and judgments modified to provide for alternative sentences provided by statute. The action of lower courts has ensured that such prisoners be treated as though the death sentence had never been imposed. Cases in which the trial court could have imposed more than one sentence other than death have been remanded for resentencing.[2] Where, as in the instant case, only one alternative punishment was available to the trial court, that punishment has been automatically imposed.[3] In some such cases the appellate court itself imposed the lesser punishment.[4] In others, appellate courts have remanded with directions that the trial court impose the alternative punishment.[5]

---

[2] *E.g.*, Huggins v. Commonwealth, 213 Va. 327, 191 S.E.2d 734, 736 (1972); People v. Speck, 52 Ill.2d 284, 287 N.E.2d 699 (1972); Anderson v. State, 267 So.2d 8, 10 (Fla. 1972). *Cf.* Sullivan v. State, 229 Ga. 731, 194 S.E.2d 410 (1972).

[3] State v. Johnson, 31 Ohio St.2d 106, 285 N.E.2d 751 (1972); Capler v. State, 268 So.2d 338 (Miss. 1972); State v. Square, 263 La. 291, 268 So. 2d 229 (1972); Garcia v. State, 501 P.2d 1128 (Okla. Crim. 1972); Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1973); State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973); Graham v. State, 253 Ark. 462, 486 S.W.2d 678 (1972); Anderson v. State, *supra*. *See also* People v. Anderson, 6 Cal.3d 628, 637 n. 45, 493 P.2d 880, 899-900 n. 45 (1972).

[4] *E.g.*, State v. Johnson, *supra;* Commonwealth v. Bradley, *supra;* Anderson v. State, *supra*.

[5] *E.g.*, Capler v. State, *supra;* State v. Square, *supra;* Garcia v. State, *supra;* Graham v. State, *supra;* State v. Waddell, *supra*.

In this case there is no pending death sentence. The narrow issue presented is whether *Furman* and the cases according it full retroactivity affect the no-parole aspect of Petitioner's commuted sentence where it is conceded that such condition could never have been imposed on Petitioner had he not been sentenced to death. Stated differently, can a penal restriction that could have come into existence only as a result of a sentence to death survive the retroactive nullification of the death penalty? Case law on point, the plain wording of *Furman*, cases implementing *Furman*, the body of case law on retroactivity of constitutional rulings, and the interests here involved all compel the conclusion that the no-parole condition can not be sustained.

The identical question raised here was recently presented to the Supreme Court of California in *In re Walker*, 112 Cal. Rptr. 177 (1974). The facts of *Walker* are virtually indistinguishable from those in this case. Like Schick, Walker was charged with first degree murder, pleaded not guilty by reason of insanity, was convicted, and was sentenced to death. In 1961 the governor of California commuted Walker's death sentence to life imprisonment without possibility of parole. In 1972 Walker challenged his conviction collaterally, and in 1974, on appeal from Solano County Superior Court, the California Supreme Court considered, *inter alia*, whether Walker's conditionally commuted sentence was affected by *People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880 (1972), the California decision that retroactively held capital punishment to be unconstitutional. Faced with these facts, the California Supreme Court held, in an en banc decision, that the no-parole condition affixed to Walker's commuted sentence was invalid.

The Court in *Walker* first noted that the only punishments provided for first degree murder under the California Penal Code were life imprisonment or death,

which are the same alternatives provided by the Uniform Code of Military Justice under which Schick was sentenced. Rejecting the argument that the combined effect of *Anderson* and the governor's commutation was to *increase* the severity of petitioner's punishment, the court nevertheless held that the no-parole condition attached to the commutation was constitutionally invalid. Since the *Anderson* decision invalidating the death penalty is, as *Furman*, " 'fully retroactive,' " the court stated, any first degree murderer subject to a sentence greater than life imprisonment for that offense is entitled to have his sentence modified. To hold otherwise, that court ruled, would discriminate inequitably against those prisoners sentenced to death who had been subject to clemency in the form of commutation to life imprisonment without possibility of parole.

> It manifestly would be inequitable to hold that, although murderers now under sentences of death may have their sentences reduced to life imprisonment (which is with possibility of parole (see Pen. Code, § 3046)), murderers such as petitioner whose death sentences have been commuted to life imprisonment *without possibility of parole* are not entitled to have that restriction removed from their life sentences. 112 Cal. Rptr. at 194 (emphasis in the original).

Comparing prisoners in Walker's situation with prisoners whose death sentences had not been commuted, the court continued:

> The two groups are identical except that prisoners in the latter group have had their sentences commuted, not unlikely as a result of circumstances in mitigation of the offense. And no considerations have led us to conclude that such inequities should be permitted. *Id.*

In addition, the Supreme Court of California expressly rejected the argument that petitioner is entitled to no relief because he is no longer under a sentence of death (*Id.*, at 193-94), an argument upon which the majority below in *Schick* relied.

Similarly, a Washington state court, on the basis of *Furman*, struck down a sentence to life imprisonment without possibility of parole conditionally imposed by a trial judge. In *State v. Baker*, 81 Wash.2d 281, 501 P.2d 284 (1972), the defendant was found guilty of first-degree murder and the jury requested that the death penalty be imposed. The trial judge, however, deferred imposition of the death penalty on condition that the defendant be imprisoned for life with no possibility of parole, a sentence not authorized by statute. Considering the case on appeal in light of the intervening decision of *Furman v. Georgia*, the Supreme Court of Washington invalidated the deferral and the imposition of no-parole life imprisonment and remanded for resentencing.

By contrast, a divided Court of Appeals below held that Schick's no-parole condition was unaffected by *Furman v. Georgia, supra*. In support of this conclusion, the court stated that the death penalty, which had not been ordered executed, had not been "imposed" on Schick. That position is untenable. Under military law it is clear that a sentence is imposed when it is adjudged at trial. The Manual for Courts-Martial, *supra*, explicitly and repeatedly states that a sentence is "imposed" when it is adjudged by a court-martial at trial. *See, e.g.*, paras. 76*a*(2), (4), (5), 76*b*(1); 81*d*(1); 125, 126*a*, MCM, 1969 (Rev.). Paragraph 126, *supra*, deals specifically with limitations on the trial court's "*imposition* of the death penalty [emphasis added]." That petitioner's death sentence had not been finally executed is irrelevant. The provisions of military law regarding execution of sentences simply parallel civilian

procedures under which execution is stayed pending appellate review.[6]

Moreover, the lower court's contention that the punishment had not been imposed on Schick exalts form over substance and ignores practical reality. Schick spent six years in prison on death row awaiting execution only because a sentence of death had been imposed on him. Had the death sentence not been imposed, Schick would not now be serving under the unique handicap of permanent parole ineligibility. Even the President's commutation order recognized that the sentence had been imposed and that his action only modified it: "As thus commuted, *the sentence* will be carried into execution." (A. 35; emphasis added.) Had no sentence been imposed, there would have been no sentence to commute.

The results reached in *Walker* and *Baker* and the result we seek here are consistent with, and indeed are compelled by, the plain language of this Court's decision in *Furman*. This Court's per curiam decision in *Furman* struck down, on constitutional grounds, the "imposition and carrying out" of discretionary death sentences. 408 U.S. at 239. By so providing, the decision did more than thwart pending executions; it expressly invalidated the *imposition* of the punishment of death. The Court's opinion in *Furman* expressly held

---

[6]The differences between the two stem primarily from the fact that appellate review in the military is automatic. Since a military accused does not have to initiate an appeal, execution is stayed by statute until appellate review is completed. Completion of review and therefore time of execution varies, however, for under military law the number of levels of appellate review to which the accused is entitled depends upon the nature and severity of the sentence. 10 U.S.C. §§857, 858, 866, 867, 869, 871 (Art. 57, 58, 66, 67, 69, 71, UCMJ); para. 88, 98-103, 110, MCM, 1969 (Rev.). *See generally* Moyer, Justice and the Military §§2-673, 2-750 to 2-808 (1972).

that the "judgment . . . is reversed insofar as it leaves undisturbed the death sentence *imposed* . . . [emphasis added]." *Id.* at 240. Accordingly, this Court and lower federal courts have, through the retroactive application of *Furman*, consistently invalidated death sentences imposed by trial courts. Rather than simply enjoin executions, these decisions have nullified the act of sentencing. *See, e.g.*, cases cited at notes 2-5, *supra*. Schick's case is different not because of the relief requested, but only because Schick, unlike most other prisoners invoking *Furman*, is concerned primarily with that portion of the Court's holding that prohibits the "imposition," rather than the "carrying out," of discretionary sentences.

There is no doubt that the process by which the death penalty was imposed on Schick was characterized by the same constitutional defects the Court condemned in *Furman*. Like all other prisoners affected by *Furman*, Schick was among "a capriciously selected random handful upon whom the sentence of death [was] in fact . . . imposed." Concurring opinion of Mr. Justice Stewart, *id.* at 309-10. And commutation has not cured the constitutional defects of this process, for Petitioner continues to suffer adverse consequences not now affecting others who were similarly sentenced and whose death sentences have been lifted. Unlike those prisoners, Schick can not under any circumstances be considered for parole. The net effect is that because of the sentencing process to which Petitioner was subjected – now declared by this Court to have violated the constitutional prohibition against cruel and unusual punishments – Schick is now in a special category, serving a unique sentence. There is no rational basis for retroactively invalidating the imposition of the death penalty and at the same time allowing to stand a subsequent penalty which could have been imposed

only bacause of the prior imposition of the death sentence.

The plain meaning of *Furman* is, we submit, dispositive of the issue in this case.

B. Analagous Case Law and Important Policy Considerations Likewise Support Invalidation of the No-Parole Restriction.

Even in the absence of squarely applicable case law, however, the result we seek would be compelled by analagous cases and important policy considerations. Invalidation of the no-parole provision is required by the general principles established by this Court on retroactivity of constitutional rulings. Although there has been considerable development in the last decade with respect to the standards by which courts determine whether a constitutional ruling is applied retroactively,[7] the law is well-established and unchanged as to the consequences of retrospective application. Where a new constitutional rule is fully retroactive, courts eradicate all adverse legal consequences of prior violations of that rule.

Implementation of *Gideon v. Wainwright*, 372 U.S. 335 (1963), holding that an indigent defendant in a state felony trial is constitutionally entitled to appointed counsel, provides several examples. Holding *Gideon* retroactive, this Court eliminated the consequences of prior violations of *Gideon* standards by invalidating convictions of prisoners serving sentences imposed at state felony trials where they had not been

[7] *E.g.*, Linkletter v. Walker, 381 U.S. 618 (1965); Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966); Johnson v. New Jersey, 384 U.S. 719 (1966); Stovall v. Denno, 388 U.S. 293 (1967); DeStefano v. Woods, 392 U.S. 631 (1968).

represented by counsel. *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963) (direct review); *Kitchens v. Smith*, 401 U.S. 847 (1971) (habeas corpus). In addition, this Court granted relief from other adverse consequences suffered by persons who had already served their sentences. In *Burgett v. Texas*, 389 U.S. 109 (1967), this Court reversed a conviction where the indictment reciting prior convictions invalid under *Gideon* was read to the jury. *Loper v. Beto*, 405 U.S. 473 (1972), reversed a conviction where defendant was questioned at trial about four convictions invalid under *Gideon*. And in *United States v. Tucker*, 404 U.S. 443 (1972), the Court ordered that the accused be resentenced where the sentencing judge gave consideration to three prior felony convictions, two of which were constitutionally invalid under *Gideon*.

These cases make clear that in applying *Gideon* retrospectively the Court has consistently sought to erase all adverse consequences traceable to violation of the principle of that decision. In *Burgett v. Texas*, *supra*, the Court wrote that a conviction violative of *Gideon* could not be used "to support guilt or enhance punishment for another offense." 389 U.S. at 115. To do so would force the accused to "suffer anew from the deprivation of that . . . right." *Id. See also Loper v. Beto*, *supra*, at 485. In this case, the unconstitutional imposition of the death sentence, without which there could not be a no-parole provision, enhances Petitioner's punishment by eliminating the possibility that he might be paroled. Similarly, in *United States v. Tucker*, *supra*, Mr. Justice Stewart wrote that the

> real question here is . . . whether the sentence in the . . . [later] case might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained. 404 U.S. at 448.

Applying the teaching of that case to Schick, it is apparent that his present sentence differs from what it would have been if the unconstitutional death sentence had not been imposed, for the only permissible alternative punishment was life imprisonment with possibility of parole. 10 U.S.C. §918 (1970).

Indeed, by holding that the no-parole provision is unaffected by *Furman v. Georgia,* the Court would create a special exception to the doctrine of retroactivity. Unaffected by the emergence of new criteria for determining whether a ruling is to be retroactive (note 7, *supra*), the law is settled and unchanged that where a constitutional ruling held to be retroactive, its retrospective application nullifies prior violations of the newly announced rule. Implicit in the Solicitor General's Opposition to the Petition for Certiorari, however, is the novel suggestion that under *Furman* previously imposed death sentences shall be retroactively void for some purposes (namely, the carrying out of such sentences) but not for others (namely, providing the basis, through "commutation," for imposing otherwise unlawful sentences). Such an application, squarely rejected by the California Supreme Court sitting en banc, conflicts with the established body of law on retroactive constitutional rulings.

The rule of these retroactivity decisions also conforms with the principle embodied in the fruit of the poisonous tree doctrine. Although that doctrine applies to admissibility of evidence, not at issue in this case, it embodies the general principle that the government may not take advantage of its own unlawful acts. Where a governmental act is declared unlawful, adverse consequences derived from that act are in like manner legally impermissible. The rule is solidly established that the prohibition against the use of illegally seized evidence extends as well to the fruits of unlawfully seized evidence, *i.e.*, other evidence obtained indirectly through use of the evidence obtained illegally.

As recently as a few months ago, this Court reiterated that a "defendant is entitled to suppress not only the fruits of an unlawful search and seizure but also any derivative use of that evidence." *United States v. Calandra,* ___ U.S. ___, 94 S. Ct. 613, 623 (1974). The manner in which the government seeks to sustain Schick's no-parole provision, derived from the unlawful imposition of the death penalty, is not, despite the obvious distinction, unlike attempts to resist exclusion of "fruits" derived from unlawfully obtained evidence.

Moreover, there is no valid state interest to be served by preserving the condition that Petitioner never be allowed to be considered for parole. Such a rarely imposed condition can serve no deterrent purpose; it results, as Mr. Justice White said of discretionary imposition of the death penalty, in "only marginal contributions to any discernible social or public purposes." *Furman v. Georgia, supra,* at 312. That no accepted social interest is served by a penalty of life imprisonment without chance for parole is further confirmed by the conspicuous absence of that punishment from the federal statutory scheme. Likewise, the maintenance of a sentence to life imprisonment with no possibility of parole advances no penological interest of the State; indeed, it is inimical to the policy favoring rehabilitation that has long been the central feature of the federal system of penology.[8] The legitimate societal

[8] Parole has been available to federal prisoners continuously since the first federal parole law became effective on June 25, 1910. 36 Stat. 819. Prisoners sentenced to life imprisonment have been eligible for parole since January 23, 1913. 37 Stat. 650. Reporting out the first federal law, the House Judiciary Committee stated that "such laws have come to be regarded as humane, in the interests of sound policy, and highly beneficial to the welfare of society." H.R. Rep. No. 1341, 61st Cong., 2d Sess. 4 (1910). With only very limited exceptions (certain narcotics offenses) enacted in 1956 (70 Stat. 567 (July 18, 1956), §103), and curtailed in 1966 (80 Stat. 1449 (Nov. 8,

interest of isolating unrehabilitated prisoners from society at large can in this case be served – as it is served in the case of every other federal prisoner sentenced to life imprisonment – by the rules and decisions of the United States Parole Board.

Finally, if the no-parole condition attached to Petitioner's sentence of life imprisonment were allowed to stand, the effect would be to penalize him uniquely. Petitioner is now in a worse position than all other federal prisoners upon whom the death penalty had been imposed but not executed at the time *Furman* was decided. The reason for this anomaly is that, unlike those prisoners whose death sentences have now been nullified, Schick had been singled out for clemency. Prisoners who were not so treated now come within the reach of applicable parole statutes. Had they, like Schick, been subjects of clemency in the form of commutation to no-parole life imprisonment, they would be in a worse position than they now are. The irrationality of such a result is, of course, obvious. Permitting such a situation to stand would perpetuate a severe and fortuitous inequity and would pervert the purpose of the clemency power.

1966)), Congress has maintained a universal parole policy. The fundamental commitment of this law to the concept of rehabilitation is reflected in the present parole statute which provides that the maximum period of ineligibility for parole shall be 15 years, even in the case of life imprisonment. 18 U.S.C. §4202.

II.

COMMUTATION TO LIFE IMPRISONMENT WITH NO POSSIBILITY OF PAROLE EXCEEDS THE PRESIDENT'S ARTICLE II, SECTION 2 POWER TO COMMUTE A SENTENCE.

The President's power to commute sentences is based on Article II, Section 2 of the Constitution, which authorizes the President to grant "reprieves and pardons" for offenses against the United States except for cases of impeachment. *Biddle v. Perovich*, 274 U.S. 480 (1927). Commutation is the substitution of a lesser, different type of punishment for the punishment actually imposed upon the defendant at trial.[9] *Schwab*

---

[9] Despite their common constitutional source, pardon and commutation are clearly distinct forms of clemency. Whereas commutation is the substitution of a milder punishment, pardon is an act of grace that relieves the recipient of all legal consequences of a conviction, punishment included. The distinction between commutations and pardons has been recognized in both federal and state law at least since the turn of the century and is now firmly established in American jurisprudence. Illustrative of the numerous cases on point is Chapman v. Scott, 10 F.2d 156, 159 (D. Conn.), *aff'd*, 10 F.2d 690 (2d Cir. 1926), *cert. denied*, 270 U.S. 657 (1926), in which the court stated:

> [T]he fact is that a distinction does exist between a pardon and a commutation, and the legal principles applicable are no longer open to question.

See also United States v. Commissioner of Immigration, 5 F.2d 162 (2d Cir. 1924); Herman v. Powell, 139 Mont. 533, 367 P.2d 553 (1961); *Ex parte Lefors*, 165 Tex. Crim. 51, 303 S.W.2d 394 (Tex. Crim. App. 1957); Gilderbloom v. State, 160 Tex. Crim. 471, 272 S.W.2d 106 (1954); Stone v. Burch, 114 Fla. 460, 154 So. 128 (1934); *In re Charles*, 115 Kan. 323, 222 P. 606 (1924); 3 *Attorney General's Survey of Release Procedures* (1939) 209; Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. Rev. 136, 138 (1964); Humbert, *The Pardoning Power of the President* 27 (1941); *Black's Law Dictionary* 351, 1268-69 (4th Ed. 1968); 59 Am. Jur. 2d §§3, 7, 8. Indeed the constitutions of more than one half of the States expressly confer on their chief executives the power of commutation as distinguished from pardon.

v. Berggren, 143 U.S. 442, 451 (1892); *Biddle v. Perovich*, *supra*, at 487. At issue here are the limitations of that presidential power.

The action in this case transgressed two clear limits on the President's commutation powers. These limits are that: (a) in commuting, the President does not have constitutional power to create new penalties unknown to the criminal code; and (b) commutation is an act of clemency which can not have the effect of increasing the penalty above the lawful maximum.

A. In Exercising His Constitutional Power To Commute a Sentence, the President Can Commute Only to a Punishment Provided by Statute.

This case involves the limitations of the President's constitutional power to commute sentences. There is no question here with respect to the existence of the power to commute. Nor does this case challenge the absolute discretion of the President to decide in which cases he wishes to exercise the commutation power. The only issue presented is what the limits of that power are in terms of the lesser punishments the President may substitute.

That some limits to the President's constitutional power to commute do exist is a matter of general agreement and appears not to be an issue in this case. At no place in his Memorandum in Opposition to the Petition for Certiorari does the Solicitor General challange the proposition that the power is not without limits. This view is consistent with judicial precedent. Courts have frequently stated that the Chief Executive may not attach any condition to a pardon that is "illegal, immoral, or impossible of performance." *E.g.*, *United States v. Six Lots of Ground*, 27 Fed. Cas.

1097, 1098 (1872); *Kavalin v. White*, 44 F.2d 49 (10th Cir. 1930); *Lupo v. Zerbst*, 92 F.2d 362 (5th Cir. 1937), *cert. denied*, 303 U.S. 646 (1938); *Pardoning Power of the President*, 41 Op. Atty Gen. 251, 252 (1955).[10] Consistent with the existence of limits, the Solicitor General defends commutation to life imprisonment with no chance for parole in this case as "reasonable and lawful. . . ." Memorandum for the Respondents in Opposition, at 3.

Neither the precedent cited nor the Solicitor General, however, undertakes to define what types of commutations are unlawful or otherwise to define the limits of the President's constitutional power to commute. Presumably the Government would agree that it would be illegal and beyond a President's constitutional power to "commute" a sentence to flogging, or to a $10,000 fine to be paid to the President's political party, or to the requirement that the prisoner enter the ministry. At issue here is, short of extreme hypotheticals, what are the limits on the kinds of penalties the President may impose.

Given the legality of the President's power to commute under *Biddle v. Perovich*, *supra*, the limits of this power must be – as this Court has previously implied but never held – that a President may commute only to punishments provided by statute. If a President chooses to commute to a lesser sentence rather than to exculpate completely by pardon, he may not impose a punishment foreign to the system of criminal law under which the prisoner was tried. This conclusion is supported by the accepted meaning of the

---

[10] Similarly, the King's power to pardon, on which the President's Article II section 2 clemency power is based, was historically subject to limits. *See, e.g.*, Statute of Northampton, 1328, 2 Edw. III, c.2; 4 W. Blackstone, *Commentaries on the Laws of England* 398-401 (Cooley ed. 1899). Limits to the King's power were discussed by this Court in *Ex parte Wells*, 59 U.S. (18 How.) 307, 312-13 (1855).

term commutation itself, by the language of this Court's prior decisions, and by important policy considerations that are inextricably related to the delineation of constitutional limitations.

First, the most direct and logical support for the proposition that the President may not go beyond the statutory framework in commuting a sentence stems from the meaning of the words themselves. The word "commute" means the substitution of a different, lesser form of lawful punishment. Not only is this clear from judicial discussions of the term (*see* p. 25, *supra*), this very definition was confirmed and advanced by the Solicitor General before this Court in *Biddle v. Perovich*, 274 U.S. 480 (1927). In his argument in *Biddle* the Solicitor General explicitly stated that "[a] commutation is the substitution of a milder punishment *known to the law* for the one inflicted by the court." *Id.* at 483 (emphasis added). Thus, commutation extends, by definition, only to the substitution of a punishment provided by law. If a President devises and substitutes some punishment not established by law, he is doing something other than "commuting" the sentence.

Second, this Court's decisions indicate that commutation must be a form of punishment provided by law. In *Biddle v. Perovich, supra,* this Court upheld the right of the President to commute a death sentence to life imprisonment and ruled that consent of the prisoner to such commutation was not necessary. Considering the legality of the commutation at issue, Mr. Justice Holmes, speaking for a unanimous Court, stated: "The only question is whether the substituted punishment was *authorized by law*. . . ." 274 U.S. at 487 (emphasis added). As noted in the preceding paragraph, the Government's view on this issue was the same. *Id.* at 483.

In requiring that the substituted sentence be one provided by law, the Court simply reiterated a

limitation it had implied over seventy years before. In *Ex parte Wells*, 59 U.S. (18 How.) 307 (1855), this Court passed on the validity of a commutation from death to life imprisonment. Upholding the President's action, the Court acknowledged that the law imposed limitations on the exercise of the President's pardon power, stating that the power must be exercised "*according to law*; that is, as it had been used in England, and these States when they were colonies. . . ." 59 U.S. at 310 (emphasis added). Addressing the specific question of what these limitations were in the case of commutations (pardons with penal conditions), the Court made clear that the Chief Executive could not go beyond those punishments provided by law when commuting to a lesser punishment:

> So, conditional pardons by the king do not permit transportation or exile as a commutable punishment, *unless the same has been provided for by legislation.* 59 U.S. at 313 (emphasis added).

The absence of legislative authority for life imprisonment without possibility of parole, the sentence imposed upon Petitioner here, is the paramount feature of this case.

Third, strong policy considerations support this limitation on the President's constitutional power to commute. The definition of criminal offenses and the prescription of sentences is peculiarly a legislative function. In the words of this Court: "The punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment." *Bell v. United States*, 349 U.S. 81, 82 (1955). *See also Ex parte United States*, 242 U.S. 27, 42 (1916). The Constitution confers no such power on the President, and absent an express congressional delegation, he is constitutionally precluded from

prescribing criminal punishments. Where, under the guise of commuting a sentence, the President devises a punishment that the legislature has not seen fit to authorize, he intrudes upon the domain of the legislature. Such an act directly violates the concept of separation of powers. The power to exercise clemency – that is, to bestow mercy – does not and should not extend to the invention of new punishments. Where a President elects to confer clemency in the form of commutation, relevant policy concerns dictate that the lesser punishment imposed be one of the array of penalties prescribed by the legislature.

The evils inherent in sanctioning any broader rule are obvious. If a President's power to commute is without limits, he is free to fashion any novel punishment he chooses. Such a punishment, even if less onerous than that imposed by the trial court, could be petty, venal, self-serving, political, or silly. The danger of such license is magnified by this Court's holdings that a commutation need not be accepted by the recipient in order to be implemented. *Biddle v. Perovich, supra,* at 486-88; *Chapman v. Scott, supra,* at 159-60; 3 *The Attorney General's Survey of Release Procedures* 216 (1939). That the likelihood of abuse of power is remote does not negate the existence or the appropriateness of such limits.

Moreover, the exercise of unlimited executive discretion in the exercise of the commutation power may be directly repugnant to important, established national policy. Such is the case here. Commutation to life imprisonment with no possibility of parole is directly contrary to basic United States penal policy. It is inconsistent with the basic purpose of the correctional system to rehabilitate those convicted of crime. *See* authority cited in note 9, *supra.* Life imprisonment without possibility of parole shares with the death penalty the characteristic of "rejection of rehabilitation of the convict as a basic purpose of criminal justice."

Furman v. Georgia, supra, at 306 (Stewart, J., concurring).[11]

Authorities relied on by the Court of Appeals below, by the 1955 Attorney General's Opinion, and by the Solicitor General in his Opposition to the Petition of Certiorari provide no support for the contention that a

---

[11] Although we have not here advanced the argument that life imprisonment without possibility of parole is unconstitutional *per se,* the argument is particularly strong that *as imposed in this case,* it constitutes cruel and unusual punishment. The imposition of life imprisonment with no possibility of parole shares all of the constitutional infirmities this Court found to be decisive in *Furman.* First, this sentence incorporates the defects of *Furman,* for it was derived directly from, and could not exist but for, the imposition of the death sentence, which this Court has held invalid under the Eighth Amendment. Moreover, the sentence of no-parole life is itself infected in the same way as the death penalty. This sentence has in fact been inflicted on only a "capriciously selected random handful. . . ." 408 U.S. 309-10 (Stewart, J., concurring). Even more than the death penalty, this punishment fails to serve the major goal of deterrence since it "is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others." 408 U.S. at 312 (White, J., concurring). Like death, this punishment is unusually severe, is inflicted arbitrarily, is substantially rejected by contemporary society, and serves no penal purpose more effectively than some lesser punishment. 408 U.S. at 282 (Brennan, J., concurring). Indeed, it is clear that reasons cited in the dissent in *Furman* for upholding the death penalty do not exist in the case of the non-statutory penalty at issue here. Of substantial significance to the four dissenting justices was the fact that the death penalty was expressly provided by the legislature. "Judicial findings of impermissible cruelty have been limited, for the most part, to offensive punishments *devised without specific authority* by prison officials, not by legislatures." 408 U.S. at 384 (Burger, C.J., dissenting; emphasis added). Noting that legislative authorization is not conclusive, the Chief Justice stated that "the *primacy of the legislative role* narrowly confines the scope of judicial inquiry." *Id.* (emphasis added). The complete absence of legislative authority is, of course, at the heart of the issue here.

President may commute to a sentence not provided by law. Cases cited either involve confusion in terminology, do not actually support the proposition named, or are themselves based on inapposite authority.[12]

First, several lower court decisions cited involved not commutations, but pardons with non-penal condition. *Kavalin v. White*, 44 F.2d 49, 50 (10th Cir. 1930); *Ex parte Weathers*, 33 F.2d 294 (S.D. Fla. 1929); *Lupo v. Zerbst*, *supra*; *Vitale v. Hunter*, 206 F.2d 826 (10th Cir. 1953). Two cases cited in support of the legality of conditional commutations, *Stroud v. Johnston*, 139 F.2d 171 (9th Cir. 1943), *cert. denied*, 321 U.S. 796 (1944), and *Ex parte Weathers*, *supra*, both rely on prior authority that does not support their conclusion. Both rely on *Ex parte Wells*, *supra*. However, at issue in *Wells* was not a conditional commutation, but a simple commutation, which was referred to as a "conditional pardon." Also cited by *Weathers*, *supra*, at 295 was *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833), a case involving a simple pardon. In like manner, *Hurt v. Moseley*, No. 71-1307 (10th Cir. Sept. 13, 1971), is based on inapposite authority. *Hurt*, an unpublished opinion affirming, without hearing, a district court's denial, also without hearing, of a pro se petition, based its support of conditional commutations on *Vitale*,

[12]Some confusion in this area and the occasional disregard of the distinction between commutations and pardons with non-penal conditions may be traced to the close historical relationship of the two concepts and the fact that the power to commute derived directly from the power to pardon. In the nineteenth century this Court ruled that the power to grant pardons included the power to grant conditional pardons, that is, to authorize release upon the performance of some conditions. United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833); *Ex parte Wells*, *supra*; Semmes v. United States, 91 U.S. 21 (1875). From conditional pardons the next step was for the President to impose penal "conditions" on pardons, that is, to pardon on condition that the prisoner serve some lesser punishment. In 1927 this Court discarded the fiction of calling such actions "conditional pardons" and expressly recognized them as

Lupo, and *Stroud*. In *Bishop v. United States*, 223 F.2d 582 (D.C. Cir. 1955), the court upheld the commutation of a death sentence to life imprisonment on the condition that the sentence be considered to run from the date of commutation. The court supported its ruling with one conclusory sentence citing no authority. *Id.* at 588.

Of the four Supreme Court decisions cited below in support of conditional commutations, not one is on point. Except for *Wells*, discussed above, none involved a commutation at all. At issue in *Semmes v. United States*, 91 U.S. 21, 27 (1875), was a pardon with a non-penal condition. In the only relevant language, the Court simply noted that the *pardons* may be "subject to conditions and exceptions. . . ." *United States v. Klein*, 80 U.S. 128, 142, 147 (1871), dealt with a general post-Civil War pardon and amnesty and stated simply that pardons may be granted on conditions. In *Ex parte Grossman*, 267 U.S. 87, 107, 120 (1925), the Court upheld the President's action *remitting* part of a sentence and ordering that the remainder of the sentence, a fine, be executed.

It is evident, as discussed in note 12, *supra*, that the terminology in many of the above cases is imprecise. The obvious reason is that many relate back to very early cases decided before commutations had become an accepted form of clemency or, indeed, in some cases, even before the term *commutation* had come into usage in judicial opinions. With this and the historical pattern of development of commutations in mind, it becomes clear that the authorities cited by the court below and the foundations on which they are based furnish no valid support for the notion that a President can commute a sentence to some lesser punishment not provided by law. To the contrary, prior decisions of

commutations. Biddle v. Perovich, *supra*. The earlier overlapping usage in terminology has caused a few courts to refer to all conditional pardons, including those with non-penal conditions, as "commutations." Such confusion is evident in some of the cases cited above.

this Court suggest that when commuting a sentence a President must select the lesser punishment from those provided by statute.

Indeed, in his Memorandum in Opposition the Solicitor General implicity acknowledges that the milder punishment substituted by commutation must have some statutory basis. In seeking to explain the government's position in *Biddle v. Perovich, supra,* that commutation is substitution of "a milder punishment known to the law . . . ," the Solicitor General states that "the plain meaning [of that statement] is that the punishment must be one *recognized by the law as a valid form of punishment.*" Memorandum for the Respondents in Opposition, n. 1, p. 4. But the Solicitor General's effort to suggest any statutory basis for the penalty imposed upon Petitioner consists, inexplicably, of the citation of a statute, the Narcotics Control Act of 1956, which covers only narcotics offenses and which does not authorize under any circumstances a no-parole-for-life penalty. The Solicitor General was unable to point to any statute – and there is none – authorizing a penalty of no-parole-for-life for any crime, much less for the crime of which Petitioner was convicted. Although the narcotics statute is wholly inapplicable, it does illustrate an important point: in prescribing penalties Congress is aware of the existence of the general parole statute, and it knows how to, and will, expressly and narrowly override that statute when it desires to do so.[13] Indisputably it has not authorized,

[13]The very limited no-parole provisions were written into the Narcotics Control Act for special reasons relating entirely to the nature of drug offenses and drug offenders. The legislative history shows that Congress deemed it imperative at that time to "remove from society . . . illegal traffickers," that this purpose would be "defeated" by parole eligibility and that rehabilitation of drug offenders would best be carried out "in a drug-free environment which makes institutional care essential." H.R. Rep. No. 2388, 84th Cong. 2d Sess., quoted at 2 U.S. Code Cong. & Ad. News 3281, 3284, 3286 (1956). After ten years, however, Congress found these limited exceptions to universal parole eligibility to be unduly restrictive of rehabilitation. Congress therefore enacted Title V of the Addict Rehabilitation Act of 1966 (80 Stat. 1449) which extended eligibility for parole, retroactively as well as prospectively, to violators of drug laws relating to marihuana.

in either military or civilian codes, the imposition of life imprisonment with no possibility of parole.

There is no question that in this case the President transgressed the limitations previously suggested by this Court. Life imprisonment with no possibility of parole, Schick's commuted sentence, is not provided by statute. It is, in fact, completely foreign to the system of law. Congress has authorized such a punishment nowhere in the Uniform Code of Military Justice; under military law it is an unlawful sentence. Even under civilian federal criminal statutes – to which Schick as a serviceman abroad was *not* subject – such a punishment is nowhere to be found. Thus, under the limitations of the President's constitutional power to commute sentences outlined above, that portion of the President's March 25, 1960 action ruling out eligibility for parole was unlawful.

B. The Action of the President in This Case Can Not Now Be Sustained Because It Has the Net Effect of Increasing Petitioner's Sentence Above the Maximum Lawful Punishment.

Even if the President is not constitutionally bound to commute to a punishment prescribed by law, his action in this case can not stand because it has the net effect of increasing Petitioner's sentence above the lawful maximum. Since commutation, by definition, involves a reduction in sentence, the President's action can not now be sustained.

Under the retrospective effect of *Furman*, the only constitutional punishment under article 118 of the UCMJ was life imprisonment *with* possibility of parole. Under present constitutional standards, applied retroactively, that is the only constitutional punishment that could have been imposed on Schick at trial. The action of the President imposing a sentence of life imprisonment without possibility of parole, has therefore, in retrospect, resulted in an increase over the lawful maximum punishment. Because the power to commute is, by definition, the power to reduce to a lesser punishment (*Biddle v. Perovich, supra,* at 487), this action can not now be upheld as a valid commutation. There is no dispute that under *Furman* the current President would have no authority to commute to life imprisonment without parole; under the retrospective application of *Furman*, action by President Eisenhower to the same effect can be given no greater validity.[14]

CONCLUSION

The Court should declare that the no-parole restriction imposed upon Petitioner is invalid and that the United States Parole Board is obliged promptly to consider Petitioner for parole.

In the foregoing, we have set forth a number of independently dispositive reasons why Petitioner is

[14]This point, it should be noted, is different from the argument of section I of this brief. In that section we show that, apart from any considerations of Presidential power, decisions on retroactivity require invalidation of continuing adverse consequences derived from the imposition of the death penalty. Even if that were not so, however, the action in question here can not be sustained because its net effect, in light of *Furman*, was to increase Petitioner's punishment above the lawful maximum, and this the President has no constitutional power to do.

entitled to this narrow but important form of relief. If we are correct on any one of these arguments, the decision of the lower court should be reversed and the sought relief ordered.

In addition to the legal arguments presented, we emphasize that the balance of interests in this case is strongly on the side of the relief sought by Petitioner. On the one side, no substantial interest would be thwarted by elimination of the no-parole requirement. All that would mean is that a commutee, like others, would be entitled to *consideration* for parole.

On the other side, there are powerful interests and arguments in favor of eliminating the no-parole restriction. It is anti-rehabilitative in the extreme and otherwise contravenes federal penal policy. It is discriminatory in its application to Petitioner. Its continued application runs directly against important principles of constitutional law. The penalty should not stand.

Respectfully submitted,

ROBERT N. SAYLER
HOMER E. MOYER, JR.
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

Dated: June 6, 1974